

Factors of Labor Standards Applicability

The labor standards provisions in HUD program statutes vary considerably and there are significant differences in whether and to what extent prevailing wage requirements are applicable under these programs. This Appendix discusses some of the differences and explains how the language is interpreted for applicability purposes. These sections refer to the specific language in each statutory provision; see Appendix II-1 for the complete text of the statutory provision.

A. Housing and Community Development Act of 1974, Section 110(a) (CDBG, Section 108 Loan Guarantee, EDI/BEDI)

1. ...construction work financed...

CDBG funds (i.e., Title I funds) can be used to finance activities other than “construction work” which uses do not trigger Davis-Bacon requirements. For example, CDBG can finance real property acquisition, purchase of equipment, architectural and engineering fees, other services (e.g., legal, accounting, construction management), and other non-construction items such as furniture, business licenses, real estate taxes, and tenant allowances for such items.

On the other hand, “financing” is not limited to the act of paying for construction work directly. “Financing” can mean, for example, using CDBG assistance to pay the interest charged to reduce the interest rate on a construction loan (including certain collateral accounts). Generally, “financing” also means using CDBG funds to provide permanent financing (take-out loan) following construction.

2. ...in whole or in part...

Notice that the statute seems to anticipate that CDBG funds may be used in conjunction with other funding sources. If CDBG funds are used to finance only a portion of the construction work, labor standards are applicable to the *entire* construction work.

3. All laborers and mechanics employed by contractors and subcontractors...

The covered classes of workers are those employed by “contractors and subcontractors.” Consequently, the labor standards provisions *do not* apply to employees of the grantee (force account workers) who are not employed by contractors or subcontractors but that may be engaged on an otherwise covered project. Note that the construction work is covered but force account workers are excluded.

4. *...shall apply to the rehabilitation of residential property only if such property contains not less than 8 units*

This language represents an exemption for residential property that contains 7 or less units. Although the statute refers to the “rehabilitation” of residential property, this exemption has been interpreted to include the new construction of residential property containing 7 or less units.

Typically, single-family homeowner properties are excluded under this exemption. However, *property* is not limited to a specific building. Property is defined as one or more buildings on an undivided lot or on contiguous lots or parcels, which are commonly owned and operated as one rental, cooperative or condominium project.

Examples of 8+ unit properties may include:

- Five townhouse buildings side-by-side which consist of 2 units each.
- Three apartment buildings each consisting of 5 units and located on one tract of land.
- Eight single-family (not homeowner) houses located on contiguous lots.

Further, HUD has concluded that the term “rehabilitation” as used within the statutory language is not meant to preclude new construction from this exemption. The Conference Report on the HCD Act of 1974 indicated that at the time that the statute was written, residential new construction was not an eligible activity. However, subsequent changes to the statute now permit the use of CDBG funds (and other Title I funds) for residential new construction. Accordingly, residential new construction is treated in the same manner as residential rehabilitation for Davis-Bacon purposes.

B. National Affordable Housing Act, Section 286(a) (HOME)

1. *...affordable housing with 12 or more units assisted with funds made available under this subtitle...*

Unlike CDBG, the standard for coverage is *assisted* not financed – which provides for much broader application. This means that Davis-Bacon requirements are operable without regard to whether the HOME funds are used for construction or non-construction activities. Non-construction activities include real property acquisition, architectural and engineering fees, and other professional services. In some cases, Davis-Bacon requirements may be triggered when HOME funds are used to provide down payment assistance to individual homebuyers. (See also HUD Regulations at 24 CFR 92.354(a)(2).)

This also recognizes that HOME projects can contain units that are not assisted by HOME. The threshold applies only to the number of units assisted by HOME. For unit threshold purposes, HUD uses the number of units identified as “HOME” units under the program definition whether determined on a pro-rata basis, specific

designation or other means allowable by HUD's Office of Community Planning and Development (CPD).

Note also that once Davis-Bacon requirements are triggered, the labor standards are applicable to the construction of the entire project – including the portions of the project other than the assisted units.

2. *Any contract for the construction of affordable housing with 12 or more units assisted with funds...*

Davis-Bacon requirements are applicable to *contracts for construction* covering 12 or more HOME-assisted units. Davis-Bacon does not follow “construction work” or “projects”. This factor has implications in two ways:

- a. First, a HOME project with 12 or more assisted units that is constructed under multiple contracts each containing less than 12 HOME units is not covered. (Note: HOME regulations prohibit breaking a single project into multiple contracts for the purpose of avoiding Davis-Bacon.)
- b. Second, if multiple HOME projects each containing less than 12 assisted units are grouped into a contract(s) for construction that covers a total of 12 or more assisted units, the contract is covered.

3. *Sweat Equity.*

HOME provides for a sweat equity program (see NAHA Section 255) which permits members of an eligible family to provide labor in exchange for acquisition of property for homeownership or to provide labor in lieu of, or as a supplement to, rent payments. Such sweat equity participants are exempt from Davis-Bacon prevailing wage requirements.

C. U.S. Housing Act of 1937, Section 12(a) (Public Housing)

1. *Any contract for loans, contributions, sale, or lease pursuant to this Act...*

Prevailing wage requirements apply through provisions required in any contract for loans, contributions, sale, or lease.... Generally, the “contract” referenced, here, relates to the Annual Contributions Contract between HUD and the public housing agency. This term (contract) may also relate to an Agreement to Enter Into a Housing Assistance Payments Contract (AHAP) or an Agreement to Enter Into a Project Rental Assistance Contract (APRAC). These Agreements are executed for housing projects that will receive Section 8 rental assistance.

Prevailing wage applicability is *not* tied to a funding source nor to a specific use of any funds. This means that Federal funding for the particular development or

operations work is not a prerequisite to Davis-Bacon or HUD-determined wage rate applicability.

2. ***...(HUD-determined wage rates) shall be paid to all architects, technical engineers, draftsmen, and technicians employed in the development, and all maintenance laborers and mechanics employed in the operation..., ...(Davis-Bacon wage rates) shall be paid to all laborers and mechanics employed in the development...***

Notice that, unlike other HUD labor standards provisions, the USHA makes no distinction between laborers and mechanics employed by the agency and those employed by contractors and subcontractors. This means that “force account” labor – workers employed directly by the agency, whether on a full-time, part-time, permanent or temporary basis - must receive the prevailing wages applicable to the work they perform.

3. ***...(Davis-Bacon wage rates) shall be paid...in the development of the project involved (including a project with nine or more units assisted under Section 8 of this Act, where the public housing agency or the Secretary and the builder or the sponsor enter into an agreement for such use ...before construction or rehabilitation is commenced)...***

Notice, also, that the only applicability thresholds pertain to Section 8 projects: there must be 9 or more Section 8-assisted units *and* there must be an agreement for the Section 8 assistance before construction begins. These agreements are referred to as AHAPs and/or APRACs. The 9-unit threshold refers to the number of units in the project that are Section 8-assisted, not to the total number of units in the project. The USHA contains no unit threshold for public housing.

While the USHA does not contain a dollar threshold, HUD observes the statutory Davis-Bacon Act \$2,000 threshold for development work and has implemented a \$2,000 threshold for maintenance contracts.

D. Native American Housing Assistance and Self-Determination Act of 1996, Section 104(b), (Indian Housing)

1. ***Any contract or agreement for assistance, sale, or lease pursuant to this Act...***

Similar to the USHA (public housing), prevailing wage requirements apply through provisions required in any contract or agreement for assistance, sale, or lease.... Prevailing wage applicability is *not* tied to a funding source nor to a specific use of any funds. This means that Federal funding for the particular development or operations work is not a prerequisite to Davis-Bacon or HUD-determined wage rate applicability.

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2. ***...(HUD-determined wage rates) shall be paid to all architects, technical engineers, draftsmen, and technicians employed in the development, and all maintenance laborers and mechanics employed in the operation..., ...(Davis-Bacon wage rates) shall be paid to all laborers and mechanics employed in the development...***

Again, NAHASDA mirrors the USHA in that it makes no distinction between laborers and mechanics employed by the agency and those employed by contractors and subcontractors. This means that “force account” labor – workers employed directly by the agency, whether on a full-time, part-time, permanent, or temporary basis - must receive the prevailing wages applicable to the work they perform.

3. ***Threshold.***

NAHASDA contains no dollar or number of units threshold. However, HUD observes the statutory Davis-Bacon Act \$2,000 threshold for development work and has implemented a \$2,000 threshold for maintenance contracts.

4. ***(HUD-determined and/or Davis-Bacon and wage provisions) shall not apply to any contract ..., if such contract or agreement is otherwise covered by one or more laws or regulations adopted by an Indian Tribe that requires the payment of not less than prevailing wages, as determined by the Indian Tribe...***

This provision allows for the preemption of Federally determined (HUD-determined and/or Davis-Bacon) wage rates where a Tribe has determined prevailing wage rates for operations and/or development work. Note that the tribal determination must be of rates that “prevail”¹ and the tribal law or regulation must be applicable to the work in question. (See also ONAP Program Guidance 2003-04, dated 2/4/2003.)

5. ***Sweat Equity.***

HUD has concluded that, consistent with a provision in the USHA (predecessor to NAHASDA), family members providing sweat equity labor for construction or rehabilitation of a home assisted under NAHASDA are excluded from prevailing wage (HUD-determined and/or Davis-Bacon) coverage. *Sweat equity* means members of an eligible family may contribute labor toward the development of a homeownership project. These sweat equity participants are not covered by prevailing wage requirements. (See also, ONAP Program Guidance 2003-03, dated 2/4/2003.)

¹ HUD has not defined “prevailing” for the purposes of tribally determined wage rates. HUD, also, has not prescribed policies or procedures for the administration or enforcement of such tribal rates. HUD defers to each Tribe to establish the definitions, parameters and methodology for the determination, administration and enforcement of tribally determined prevailing wage rates.

E. Native American Housing Assistance and Self-Determination Act of 1996, Section 805(b), (Hawaiian Homelands)

1. *Any contract or agreement for assistance, sale, or lease pursuant to this Act...*

Similar to the USHA (public housing), prevailing wage requirements apply through provisions required in any contract or agreement for assistance, sale, or lease.... Prevailing wage applicability is *not* tied to a funding source nor to a specific use of any funds. This means that Federal funding for the particular development or operations work is not a prerequisite to Davis-Bacon or HUD-determined wage rate applicability.

2. *...(HUD-determined wage rates) shall be paid to all architects, technical engineers, draftsmen, and technicians employed in the development and all maintenance, and laborers and mechanics employed in the operation..., ...(Davis-Bacon wage rates) shall be paid to all laborers and mechanics employed in the development...*

Again, NAHASDA mirrors the USHA in that it makes no distinction between laborers and mechanics employed by the agency and those employed by contractors and subcontractors. This means that “force account” labor – workers employed directly by the agency, whether on a full-time, part-time, permanent or temporary basis - must receive the prevailing wages applicable to the work they perform.

3. *Threshold.*

NAHASDA contains no dollar or number of units threshold. However, HUD observes the statutory Davis-Bacon Act \$2,000 threshold for development work and has implemented a \$2,000 threshold for maintenance contracts.

4. *Sweat Equity.*

HUD has concluded that, consistent with a provision in the USHA (predecessor to NAHASDA), family members providing sweat equity labor for construction or rehabilitation of a home assisted under NAHASDA are excluded from prevailing wage (HUD-determined and/or Davis-Bacon) coverage. *Sweat equity* means members of an eligible family may contribute labor toward the development of a homeownership project. These sweat equity participants are not covered by prevailing wage requirements. (See also, *ONAP Program Guidance 2003-03, dated 2/4/2003.*)